Filed 4/10/13 In re D.M. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re D.M., a Person Coming Under the Juvenile Court Law. _____ LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. NANCY M., Defendant and Appellant.	B242264 (Los Angeles County Super. Ct. No. CK63683)

APPEAL from an order of the Superior Court of Los Angeles County, Stephen Marpet, Commissioner. Affirmed.

Grace Clark, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, Jeanette Cauble, Deputy County Counsel, for Plaintiff and Respondent.

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Nancy M. (mother) appeals from the order terminating parental rights to her daughter D.M. She argues the juvenile court erred in denying her request for a contested hearing. We find no basis for reversal.

FACTUAL AND PROCEDURAL SUMMARY

D.M., who was born in July 2010, tested positive for amphetamines at birth. The Department of Children and Family Services (DCFS) placed her in foster care, and filed a Welfare and Institutions Code section 300[1] petition on her behalf. Mother admitted to using drugs, including during her pregnancy. Her two older children had been removed from her care in 2006, due to her substance abuse.

In August 2010, the juvenile court detained D.M. and ordered monitored visits for mother. In the following two months, it sustained the petition and granted mother reunification services. Mother was ordered to complete a drug rehabilitation program with random drug testing, a parenting education class, and individual counseling.

D.M. was diagnosed with Down's Syndrome and various other conditions, such as umbilical hernia, congenital heart disease, reactive airway disease with asthma, low blood cell count, depressed immunity, and developmental delays. She had recurrent respiratory infections and required frequent nebulization therapy, as well as occupational, developmental and physical therapy.

In January 2011, DCFS reported mother was drug-free and actively participating in her treatment plan. She visited with D.M. twice a week but did not go to her medical appointments. The dependency court ordered DCFS to refer mother for training to deal with D.M.'s medical conditions and to keep her informed of D.M.'s medical appointments. Although mother was progressing well with her plan, the court denied unmonitored visits in March 2011 because D.M.'s pediatrician advised the baby was medically fragile and required complex health care. Mother had been to only one medical appointment and had not been trained on any of D.M.'s therapies. At the six-

[1] All statutory references are to the Welfare and Institutions Code.

month review hearing in April 2011, the court advised mother that the only requirement left for her reunification with D.M. was to be involved in the child's medical care.

By September 2011, mother had attended two developmental therapy sessions, during which she did not actively participate, and she did not attend any physical and occupational therapy sessions. She was going to school and continued to test negative for drugs, but missed five scheduled tests. DCFS recommended terminating mother's reunification services, and the matter was continued for a contested 12-month review hearing. At the contested hearing in December 2011, mother admitted that since October she attended seven or eight of D.M.'s 21 therapy sessions. She did not attend all of D.M's medical appointments. The trial court found her in substantial compliance and continued her reunification services to January 2012.

In January 2012, DCFS reported mother did not engage D.M. during visits and did not appear to have bonded with her. She had not trained on the nebulizer even though D.M. needed two treatments a day. DCFS continued to recommend terminating mother's reunification services, and the matter was set for a contested 18-month review hearing. Before the contested hearing in February 2012, DCFS reported mother and the maternal grandmother attended some of D.M.'s occupational and physical therapy sessions, but did not participate in them, which concerned the therapists because active participation in therapy was crucial to D.M.'s development. Mother did not attend the contested hearing, and the court found overwhelming evidence that she was not consistently involved in D.M.'s therapy and was not able to take care of her. The court terminated mother's reunification services and set a section 366.26 permanent plan hearing.

Between March and June 2012, mother visited D.M. five times. DCFS recommended termination of mother's parental rights since D.M. was likely to be adopted by the foster mother whose adoptive home study had been approved in December 2011. At the section 366.26 hearing in June 2012, an attorney standing in for mother's counsel requested that the matter be set for a contested hearing. The court stated that based on the reports before it, mother's visitation with D.M. "appear[ed] to be meager at best, one time a month for the last three or four months," and did not meet the

exception to terminating parental rights in section 366.26, subdivision (c)(1)(B)(i). It added that the request would be denied and asked if there was anything further. Not receiving any response, the court terminated mother's parental rights. At that point, mother interjected that she visited with D.M. even though the social worker had told her it did not matter what she did once her reunification services were terminated. The minute order indicates the court found no good cause to allow a contested hearing, and its findings were over mother's and her counsel's objections.

This timely appeal followed.

DISCUSSION

Mother argues the juvenile court improperly denied the request for a contested section 366.26 hearing without giving her attorney a reasonable opportunity to provide an offer of proof, and any offer of proof would have been futile in light of the court's express intent to deny a contested hearing.

The juvenile court may require "an offer of proof before conducting a contested hearing on one of the statutory exceptions to termination of parental rights" in section 366.26. (*In re Tamika T.* (2002) 97 Cal.App.4th 1114, 1122.) Mother argues the court cut off her counsel before he could articulate an offer of proof. The record does not support the claim that the attorney who stood in for mother's counsel attempted to or was prepared to make an offer of proof. Rather, the attorney only requested that the matter be set for a contested hearing and did not offer "[a]nything further" when prompted by the court.

Mother argues any offer of proof would have been futile in light of the court's indication that based on the reports before it, the request for a contested hearing would be denied. *M.T. v. Superior Court* (2009) 178 Cal.App.4th 1170 (*M.T.*), on which mother relies, is distinguishable. There, the presumed father's counsel initially maintained his client was entitled to a contested hearing '"unfettered by an offer of proof."' (*Id.* at p. 1176.) After the court requested further briefing on the issue, counsel conceded that an offer of proof was required under *Sheri T. v. Superior Court* (2008) 166 Cal.App.4th 334

(*Sheri T.*), and he could not make the necessary showing. (*M.T.*, at pp. 1176–1177.) The appellate court rejected DCFS's contention that counsel's concession forfeited any error on appeal. (*Id*. at p. 1177.) The court reasoned that an objection would have been futile because the juvenile court "was bound to follow *Sheri T.* under the principle of stare decisis. [Citation.]" (*M.T.*, at p. 1177.)

In re Valerie A. (2007) 152 Cal.App.4th 987, another case on which mother relies, also is distinguishable. In that case, the appellate court held the mother's request for sibling visitation of her children with a half-sibling would have been futile before the juvenile court's ruling that the half-sibling was not a sibling was reversed on appeal. (*Id*. at pp. 995, 1001.)

Here, in contrast, there was no prior juvenile court order or controlling appellate precedent that would render an offer of proof futile. The juvenile court stated it would deny the request for a contested hearing because the record showed mother had visited D.M. only once a month since her reunification services were terminated. There is no indication this ruling would not have changed had mother's counsel made an adequate offer of proof. On the contrary, the court expressly invited counsel to offer "[a]nything further" and terminated mother's parental rights only after "[h]earing nothing." The court did not deny mother an opportunity to make an offer of proof, and an offer of proof would not have been futile in light of the court's invitation of further argument.

Additionally, mother has not established she suffered any prejudice requiring reversal. '"The standard of review where a parent is deprived of a due process right is whether the error was harmless beyond a reasonable doubt. [Citation.]' [Citation.]" (*M.T., supra,* 178 Cal.App.4th at p. 1182.) The exception to terminating parental rights in section 366.26, subdivision (c)(1)(B)(i) applies when "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." To overcome the presumption in favor of adoption, the parent must prove that severing the parent-child relationship will cause great harm to the child. (*In re Brittany C.* (1999) 76 Cal.App.4th 847, 853.) Relevant factors include "[t]he age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or

'negative' effect of interaction between parent and child, and the child's particular needs . . . ." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.) A beneficial parent-child relationship is difficult to establish "where the parents have essentially never had custody of the child nor advanced beyond supervised visitation." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 51.)

Mother claims the record itself establishes her right to a contested hearing because DCFS authorized unmonitored visits, and mother had increased interaction with D.M. The record does not support this claim. In January 2012, the social worker apologized for incorrectly stating mother's visits with D.M. were unmonitored, and the juvenile court's order that month reflects that mother's visits were still monitored. Also in January 2012, the foster mother reported mother did not engage D.M. during visits and did not appear to have bonded with her. In February 2012, D.M.'s occupational and physical therapists reported their concern that mother and the maternal grandmother did not actively participate in therapy sessions. After her reunification services were terminated, mother's visitation with D.M. was minimal. On the other hand, D.M.'s foster care placement since birth had been stable. The foster mother took appropriate care of D.M.'s special needs and was committed to adopting her. The record does not support mother's claim that she can establish a beneficial parent-child relationship, the severing of which would greatly harm D.M.

Mother suggests alternatively that a contested hearing would not be necessary if the only evidence she had to offer was contained in the record.

But we cannot speculate whether any extra-record evidence exists that is sufficient to entitle her to a contested hearing.

DISPOSITION

The June 19, 2012 order is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.